

Defenceless Formalists: on Abuse of Law and the Weakness of the Polish Judiciary

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Marcin Matczak Do 24 Aug 2017

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Abuse of the law occurs when the law is used to pursue objectives other than those for which it was created, and when an illegal effect is achieved by lawful means. The first abuse was committed by the biblical King David: after seducing [Bathsheba](#), he sent her husband, Uriah the Hittite, to his death in a battle with the Ammonites and then married his widow. As king, David had the right to order Uriah to take part in the battle, but he did so to achieve his own ends, not to defend the country.

Marshalling the law to one's own ends

Abuse of law is a recurring element of Poland's rule of law crisis. It enabled the authorities to take control of the Constitutional Tribunal (CT) when the power to pass legislation was used for illegitimate purposes, namely to paralyse the CT. Abuse of the law by the authorities was next directed towards the Supreme Court. First, an attempt was made at a blanket removal of judges by using the power to reorganise the courts and retire judges in exceptional cases. When this failed after a presidential veto, steps to prevent the Supreme Court from issuing decisions were taken by acting CT President Julia Przyłębska (see my [previous blog post](#) for the illegitimate nature of her presidential role) and the prosecution service (who demanded that proceedings in [a politically sensitive Supreme Court case](#) be suspended).

Both Judge Przyłębska and the prosecution service relied on a previous abuse of powers by the Marshal (Speaker) of the lower house of the Polish parliament, the Sejm. He had requested the Constitutional Court to resolve a competence dispute between the Supreme Court (SC) and the President over the right of pardon. When a motion to resolve a competence dispute is brought before the CT, proceedings before the SC are suspended: the Marshal's aim was to thwart proceedings before that court, and he was successful. As in other abuse of law cases, he used his power contrary to the purpose for which it was granted to him: instead of breaking an institutional deadlock, it was used to block Supreme Court proceedings and save an ally's skin.

In accordance with the letter but not the spirit

The reader might wonder how we know that in all those cases the relevant actions were taken in bad faith. Perhaps David truly intended to defend his country, perhaps the Marshal sincerely acted to resolve an institutional deadlock, and perhaps Judge Przyłębska was concerned with procedural respect for the law? Perhaps. However, the background to their actions and the context for them show that this was not the case. Context includes the motives of the actors, their atypical actions implying an ulterior motive, and the actual results of the actions, which confirm that there was a motive.

David's motives resulted from his previous relationship with [Bathsheba](#), his actions were atypical because he pointlessly sacrificed an excellent soldier, and the result was that he married the deceased soldier's widow. In the Marshal's case, his motives resulted from his previous attitude (he persistently allowed bills violating the principle of the tripartite separation of powers to be voted upon), his actions were atypical because the competence dispute was artificial (the Supreme Court has never wanted to substitute the President in exercising powers of pardon), and the result was that the Supreme Court's independence was limited by the politically sensitive proceedings being blocked.

Can the lawfulness of somebody's action be analysed based on the context, motives and atypical nature of that

action? The answer depends on whether one is a formalist or not. According to legal formalists, the only criteria to be applied in judgement are those related to the formal correctness of the actions of the state authority. For formalists, argumentation based on concepts of bad faith and the exercise of a power contrary to its objective both leave the assessor too much room for interpretative manoeuvre and do not have a clear legal basis. In short, the answer is “no”.

Formalistic arguments are used not only by those who abuse the law and require that its letter be absolutely followed, but also by the judges who ruled that the proceedings in the politically sensitive Supreme Court case be suspended. In the elaboration of their decision, they stated that the Marshal’s motion was not abstract but oriented towards that case, which at least implies its objective. However, they did not assess whether the motion, the prosecution service’s motion based on it, and pressure from Judge Przyłębska represented abuse of law. All of these are reasons to suspect a hidden agenda on the part of the authorities, but from the formalist perspective of the judges, it would be unseemly to contaminate the purely formal nature of law with a context, politics or ordinary human deviousness. Formalists oblige actions to be taken at face value because they do not think that bad faith is a sufficient reason to challenge them, at least when it comes to the authorities.

Equal and more equal

Things are different when individuals are concerned. Formalists may not believe in the bad faith of the state, but are all too willing to believe in it when it comes to citizens of that state. For years now, civil law has provided for the “abuse of a subjective right”, where a private individual exercises a right in a manner contradictory to its purpose or to the principles of community life. For example, anyone can invoke the right to dismiss a claim against them on the basis of the expiration of the time limit for such claims. However, if the right is evoked by an individual after their use of delaying tactics (e.g. deliberately prolonged negotiation) to the point that an aggrieved party is unable to submit a motion within the stipulated time limit, the evocation of the right (a limitations plea) is considered an abuse of the law. In such a case, the court may dismiss the limitations plea under article 5 of the Polish Civil Code.

Tax law contains a tax evasion clause allowing a legal transaction made by a taxpayer to be challenged by demonstrating that its purpose was other than that declared. For example, if an individual lends their property to a stranger for free (rather than renting it out and paying tax on the rent), the treasury administration may conclude that the “lending” agreement is actually a rental one and on that basis assess tax due.

Thus the unquestioned faith of formalist judges and clerks in the actions of the state is not applied when assessing those of the individual, to the extent that they even admit non-formalist argumentation when judging individuals. As a consequence, they argue that there was an ulterior motive (prolonged negotiations) or that an action is artificial in the circumstances (it is odd to lend property to a stranger free of charge). Such argumentation refers to the citizen’s purposes and intentions, not to the formal aspect of his actions. Should not actions taken by an authority be assessed in the same way?

Illicit motive

They should. That is why US courts have been using the motive test in their judgments for years now. The test makes it possible for an action to be found unconstitutional if it can be demonstrated that the declared purpose of the action was other than the actual one or is illicit (illicit motive). This test was used, e.g. in *US v. O’Brien* and *Washington v. Davis*. The illicit motive argumentation was recently raised by a court assessing the constitutionality of President Trump’s executive order on immigration. The court ruled that the order was in fact targeted at particular countries, not individual dangerous citizens, which was unconstitutional. The court established the purpose of the executive order from the President’s Twitter post.

Why can our judges not test the purpose of a motion taken by the Marshal of the parliament or of the prosecution service that benefits from it? Because our national courts rarely use argumentation based on the motives of an

authority when assessing the constitutionality of its actions. They assume that the state is always trustworthy, even when it is clearly acting in bad faith. Formalists treat article 2 of the Polish Constitution, which lays down the principle of citizens' trust in the state and the law made by the state, not as a requirement for the authority to play fair but rather as an unconditional requirement for the subjects of that authority to trust it. In fact, the principle of trust expressed in article 2 of the Polish Constitution prohibits abuses of law: one cannot trust a state that acts with an ulterior motive and a law that deliberately has effects other than those declared.

And it is probably clear to everyone that the present authority has been acting with the illicit ulterior motive of curtailing the independence of the judiciary. The Marshal of the Sejm allowed a total of six grossly unconstitutional bills on the Constitutional Tribunal to be put before it, and three equally unconstitutional bills on common courts. Julia Przyłębska allowed so-called anti-judges to sit on the CT, and has been manipulating deadlines for dealing with cases: she swiftly examined the constitutionality of the Polish Court Register Act to enable the Law and Justice party to take control of the courts, while deliberately prolonging the examination of the matter of three judges whose appointments were challenged by the Minister of Justice in order to prevent them from ruling.

Although this does not mean that all the actions taken by Marshal Kuchciński and Judge Przyłębska are illegal by definition, there are still grounds for examining on a case-by-case basis whether the context of their actions does not imply bad faith. A taxpayer with a history of tax evasion should put the tax authorities on guard to a greater extent than one with no such history. Would the authorities always conclude blindly that an individual had acted in good faith even though the context implied otherwise? As we have seen, probably not, but that is what formalists do with respect to an authority that has repeatedly acted in bad faith.

When the authorities cheat

The principle of equal treatment requires that abuses of law by the authorities be remedied by application of the same standards to them as are applied to individuals. If it can be demonstrated that an individual is acting for a purpose other than that declared, the same can be demonstrated with regard to an authority. To do so requires the motives of the authority to be examined, and arguments based on the purposes and functions of institutions to be used. This in turn involves a direct application of the constitution, especially in this case its regulations regarding the function of an independent judiciary. As long as our judges do not treat authorities and individuals equally, we will be defenceless against the authorities who are using the institutional powers of the state to dismantle the rule of law.

Formalists immersed in the world of legal regulations but unheeding to the real world behind them will pretend that the game is being played according to the rules, even when the essence of all those rules have been broken. They will be defenceless against the abuse of law because a purely formal analysis will prevent them from seeing it: the abuse of power is lawful in form but unlawful in effect. They will never share the opinion expressed in *Ho Ah Kow v. Nunan*: "... we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men ...".

Constitutional contempt

According to the prophet [Nathan](#), by misusing his powers David showed contempt for God's law. In our secular state, the Constitution is the counterpart of God's law. Sadly, our judges find that the Constitution cannot be applied directly even though Article 8 expressly provides a basis for its direct application. Consequently, our judges will never oppose abuses by the authorities.

As long as judges fail to treat the Constitution as hard law and they avoid arguments based on its principles, purposes and functions, they will be unable to oppose abuses by the authorities. This judicial formalism makes it possible for David-like authorities to use the law as a tool for actions promoting illicit interests rather than to pursue objectives established for the public good.

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